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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

Nos. 611 and 612

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE AND PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioners,

VS.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents,

REPLY BRIEF OF PETITIONER PUBLIC SERVICE COMMISSION OF MARYLAND

CHARLES D. HARRIS,
General Counsel,
Public Service Commission
of Maryland.

Baltimore, Maryland
March 27, 1952

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Certain statements in the brief in opposition of the respondent, Pennsylvania Water and Power Company (Penn Water), particularly on pages 26 and 27 thereof, call for an answer by the Maryland Commission.

The statement that "Penn Water has consistently offered to Consolidated the same services Consolidated has been receiving" is simply not true. If it were true, neither Consolidated nor the Maryland Commission would be requesting the assistance of this Court to retain those services for the benefit of the Maryland public.

Moreover, Penn Water would not be asking this Court to nullify the FPC rate orders, setting reasonable rates for those services, now before this Court in Cases Nos. 428 and 429. Those rate orders merely preserve the services as they have been conducted since 1931, but require Penn Water's rates therefor to be reasonable. If Penn Water is not seeking to change its *services* to Consolidated so as to escape FPC's rate control, it would be asking this Court in Cases Nos. 428 and 429 to review FPC's determinations as to rate base, rate of return, etc. Instead, it urges as its main and almost sole argument, in those cases, that the basic service *contracts* are unlawful.

The record in Cases Nos. 428 and 429 will show that FPC eliminated from its rate orders the only provisions which Penn Water questioned in the first instance in the Penn Water contract (Articles IV and V), and the only provisions which the Fourth Circuit found to be invalid. The only provisions of the Safe Harbor contract considered by the Fourth Circuit as making it illegal have played no part during its 20 years of operation, and are clearly separable. Consolidated and the Maryland Commission urged their separability upon the Fourth Circuit, and urge it here.

If Penn Water does not want to change Safe Harbor's obligation under the Safe Harbor FPC tariff to supply Consolidated with two-thirds of the Safe Harbor output, or if it does not want to change Penn Water's obligation to compensate Consolidated for its diversion of power to Penn Water's Pennsylvania customers, as such compensation was ordered by FPC, why does Penn Water seek to destroy the entire Safe Harbor agreement?

Penn Water's obvious purpose is to obtain for its own use in Pennsylvania (with the aid of the Pennsylvania Commis-

sion) as much of the inexpensive Safe Harbor power as possible. Such power, diverted into Pennsylvania, would have the advantage not only of being inexpensive but, under the arguments of both Penn Water and the Pennsylvania Commission, would escape FPC control by such use in Pennsylvania. Consolidated and the Maryland public would lose the two-thirds share of Safe Harbor power which has been their legal entitlement since 1931, and which has been so found by every court and commission that has faced the question, including the Fourth Circuit.

Since the Maryland Commission approved Consolidated's investment in two-thirds of Safe Harbor's equity capital, its guarantee of all of the original bonds directly, and has permitted Consolidated throughout the development years to guarantee Safe Harbor's operating expenses, taxes (including income taxes), and a specified return in reliance upon Consolidated's long-term rights to Safe Harbor power, we do not accept lightly the *characterization* as a "myth" that the Maryland public is dependent for power on Consolidated's contractural entitlement to two-thirds of the Safe Harbor output.

It is no "myth" to the Maryland public that the 1950 Safe Harbor rate reduction affirmance* resulted in a prompt passing on to the public of those benefits, through a rate reduction by Consolidated. It is no "myth" that the affirmance of the Penn Water rate reduction (now before this Court in Cases Nos. 428 and 429) will involve annual rate reductions to Consolidated for 1949, 1950, and 1951 of $1,700,000 on the 1946 basis used by FPC. Whatever the amount, Consolidated has pledged to the Maryland Com-

* Safe Harbor Water Power Corp. v. Federal Power Commission, 179 F. 2d 179, cert. denied 339 U. S. 957 (1950).

mission that it will pass on these benefits to the public, as ordered by our Commission.

As to the asserted Conowingo "myth," we re-assert the correctness of our statement. An examination of our original approval of the service, of the Conowingo Company's charter, and of the various changes in the Maryland statutes will support our position if it should ever become an issue. We made our statement in the first instance and confirm it now, primarily to emphasize that the Maryland public, through the Maryland Commission, in attempting to preserve Consolidated's right to the full benefit of two-thirds of Safe Harbor power. In doing so, the Maryland public is asking for no more than its fair and equitable share of the Susquehanna River power generated in Maryland and Pennsylvania.

Respectfully submitted,

CHARLES D. HARRIS,

General Counsel,
Public Service Commission
of Maryland.

Baltimore, Maryland

March 27, 1952

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 428

PENNSYLVANIA WATER & POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

No. 429

PENNSYLVANIA PUBLIC UTILITY COMMISSION, PETITIONER

v.

FEDERAL POWER COMMISSION

No. 611

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE, PETITIONER

v.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION

No. 612

PUBLIC SERVICE COMMISSION OF MARYLAND, PETITIONER

v.

PENNSYLVANIA WATER AND POWER COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION

MOTION OF THE FEDERAL POWER COMMISSION TO POSTPONE ARGUMENT IN NOS. 428 AND 429 FOR THREE WEEKS AND MEMORANDUM AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR CERTIORARI IN NOS. 611 AND 612

The Federal Power Commission moves that this Court postpone the argument in Nos. 428 and 429

three weeks from the week of March 31 to the week of April 21, so as to enable the Court to decide whether to grant certiorari in Nos. 611 and 612, and if certiorari is granted, to set the cases down for argument together during the week of April 21. The Government also submits that the petitions for certiorari in Nos. 611 and 612 should be granted.[1]

The conflict between the decision of the Court of Appeals for the District of Columbia in the cases presently before the Court (Nos. 428 and 429) with the decision of the District Court, now affirmed by the Fourth Circuit, in Nos. 611 and 612, was emphasized by Penn Water (Pet., No. 428, pp. 1, 3, 4, 9, 14, 15, 17; see also Pet., No. 429, pp. 29, 38) as a principal reason for granting certiorari in No. 428.[2] The Fourth Circuit's decision on affirmance was the first in the group of related cases which, by so stating explicitly, acknowledged that the two circuits were in disagreement. In addition, the issue upon which the two courts have disagreed is more likely to be reached in Nos. 611 and 612 than in Nos. 428 and 429. In

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[1] The Federal Power Commission is, of course, a party in Nos. 428 and 429. It unsuccessfully sought to intervene in the Fourth Circuit in Nos. 611 and 612, but was allowed to file a brief and argue orally. It is appearing in this Court in the latter cases as amicus curiae.

[2] Penn Water's petition also relied of course, upon the conflict which the earlier decision of the Fourth Circuit in *Penn Water and Power Company* v. *Consolidated Gas, E. L. & P. Co.*, 184 F. 2d 552, certiorari denied, 340 U. S. 906, 186 F. 2d 934, which preceded the decision in the District of Columbia Court of Appeals.

the order reducing rates in Nos. 428 and 429, the Federal Power Commission prescribed certain rate schedules to supersede the previous rate and charges and ordered that all "other provisions of the * * * contracts *in and of themselves lawful* prescribing or defining the * * * services to be furnished * * * shall be observed and be in force" (No. 428, R. XVII 62, italics supplied), thereby excluding provisions which as private contracts might be authoritatively determined to be in violation of the antitrust law. The order involved in Nos. 611 and 612 (which has been upheld by the Third Circuit in *Safe Harbor W. P. Corp.* v. *Federal Power Commission,* 179 F. 2d 179, certiorari denied, 339 U. S. 957) contains no such qualification, and thus clearly requires compliance with the contract on file with the Federal Power Commission, allegedly restrictive clauses and all, unless and until the Commission modifies its own order. These factors make the controversy in Nos. 611 and 612 a more appropriate vehicle than Nos. 428 and 429 for determination of the important issue upon which the two circuits have disagreed, *i.e.,* whether the Federal Power Commission may order a power company to carry out an arrangement which, as an agreement between the parties, would otherwise violate the Sherman Act. The denial of certiorari in the first *Penn Water* case (340 U. S. 906), in which the Federal Power Commission had only ordered compliance with arrangements "in and of themselves

lawful" and before the existence of the conflict with the District of Columbia Circuit would not, of course, justify a denial in Nos. 611 and 612 after the two Circuits had openly disagreed, and in a case in which the Commission had prescribed the arrangement found unlawful by the Fourth Circuit.

The desirability of hearing the cases together does not depend merely on the fact that they are in conflict. The companies and the State Commissions involved are the same. Penn Water and Consolidated each possess half of the voting rights in Safe Harbor, although Consolidated invested two-thirds of the capital and is entitled to two-thirds of the power. The contracts have been found by the Fourth Circuit to be indistinguishable both with respect to separability and anti-trust violation. And more importantly, Penn Water and the Pennsylvania Public Utility Commission, petitioners in Nos. 428 and 429, are insisting that the contracts are interdependent, that the Penn Water Contract "was linked to a companion contract (the Safe Harbor contract)." (Pet. No. 428, pp. 3, 14-15; Pet. No. 429, pp. 37-38). Both petitions urge that the Federal Power Commission "based the critical features of the orders * * * upon the assumed existence and continuance of the illegal Baltimore and *Safe Harbor* contracts." (Pet. No. 428, p. 3; Pet. No. 429, p. 37; italics supplied).[3] The petitions also argue that the existence of the interstate power pool "depends upon the illegal contracts * * *

and upon the illegal revenue pooling provisions thereof" (Pet. No. 428, p. 14; Pet. No. 429, pp. 37-38). It is also contended (Pet. No. 428, p. 15) that the allocation of the reduction in rates as between the Baltimore company and the Pennsylvania utility customers of Penn Water rested on the basis of the alleged " 'entitlements' of Consolidated under the Baltimore and Safe Harbor contracts" and that "without the illegal contracts such 'entitlements' would be nonexistent." It is thus clearly petitioners' position in Nos. 428 and 429 that the decision of the Fourth Circuit in Nos. 611 and 612 as to the validity of the contracts supersedes the orders of the Federal Power Commission and destroys a portion of the premises upon which those orders rest.

The alleged interrelationship [4] between the contracts and the Federal Power Commission orders with respect thereto makes it highly desirable that the cases be heard and decided together if this can be accomplished without undue delay. We are advised that counsel for Consolidated requested counsel for Penn Water to cooperate in Nos. 611 and 612 so as to enable all of the cases to be heard together this Term. This request, which seems

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[3] The Statements in both petitions repeatedly refer to the Safe Harbor contract as well as to the Penn Water contract (Pet. No. 428, pp. 3, 4, 6, 7, 9, 10; No. 429, pp. 12, 13).

[4] The statement herein of the contentions of the petitioners in No. 428 and 429 and respondents in Nos. 611 and 612 is not to be taken as an admission of the validity of those contentions, but merely as showing the questions which will necessarily be argued in the cases.

to us to have been entirely reasonable, was refused on the ground that the cases were not sufficiently related, a position which hardly seems consistent with Penn Water's petition for certiorari in No. 428 and its emphasis on the conflict between them. By not consenting to certiorari in the case which establishes the conflict upon which it relied, Penn Water will prevent this Court from passing on the petition until March 31, which would normally be too late for the case to be heard this Term if certiorari is granted.

The circumstances set forth above, however, in our opinion, would justify the Court in granting certiorari in Nos. 611 and 612 and in setting them down for argument during the week of April 21. What we believe to be the critical issues involved will have been briefed in Nos. 428 and 429. As to the others, we are advised that if this motion to postpone the argument of the latter cases for three weeks is granted (thus indicating a possibility that the cases might be heard together), Consolidated and the Maryland Commission will immediately commence the preparation of their briefs in Nos. 611 and 612, and drafts will be served on respondents in these cases far enough in advance of argument to enable respondents to have the two weeks allowed by the Rules to reply thereto.

The Government does not wish to delay final decision in the already prolonged litigation involved in Nos. 428 and 429, but postponing the argument for three weeks would not unduly delay

the ultimate determination. And the advantages of hearing Nos. 611 and 612 at the same time and thus speedily disposing of all aspects of an interrelated controversy lead to the conclusion that both the public interest and the orderly management of this Court's business would be better served if the cases could be heard together this Term, notwithstanding the opposition of Penn Water to that procedure.

Accordingly, it is respectfully submitted that this Court should (1) postpone the argument in Nos. 428 and 429 until the week of April 21, (2) grant certiorari in Nos. 611 and 612, and (3) order the latter cases argued during the week of April 21, immediately following Nos. 428 and 429.

PHILIP B. PERLMAN,
Solicitor General.

BRADFORD ROSS,
General Counsel,
Federal Power Commission.

I join in this motion to postpone the argument in Nos. 428 and 429.

CHARLES D. HARRIS,
General Counsel,
Public Service Commission of Maryland.

MARCH, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

Nos. 611 and 612

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE AND PUBLIC SERVICE COMMISSION OF MARYLAND, PETITIONERS

v.

PENNSYLVANIA WATER & POWER COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

The Government assumes that this Court will determine the appropriate disposition of this case after full consideration in the light of the briefs and oral argument in Nos. 428 and 429.[1] In our brief in those cases (pp. 94–105) we have stated our reasons for believing that the decision

[1] *Pennsylvania Water and Power Co.* v. *Federal Power Commission, Pennsylvania Public Utility Commission* v. *Federal Power Commission.*

of the Fourth Circuit in the instant case contravenes the doctrine of primary jurisdiction and the statutory scheme for review of orders of the Federal Power Commission.

The purpose of this memorandum is to correct a misstatement in Penn Water's brief in opposition in Nos. 611 and 612. In two places the brief declares that the Government's prior memorandum "concedes" that "the contract 'as an agreement between the parties, would otherwise violate the Sherman Act'" (pp. 7, 11). The quoted expression was the last clause in the sentence which reads in full (Government's Memorandum as Amicus Curiae in Support of Petitions for Certiorari in Nos. 611 and 612, p. 3):

> These factors make the controversy in Nos. 611 and 612 a more appropriate vehicle than Nos. 428 and 429 for determination of the important issue upon which the two circuits have disagreed, *i. e.*, whether the Federal Power Commission may order a power company to carry out an arrangement which, as an agreement between the parties, would otherwise violate the Sherman Act.

It is apparent that, restored to its context, the passage quoted by petitioner contains no concession or admission of any sort, but was merely descriptive of the issue as to which the two courts of appeals had disagreed, without characterizing the facts of the instant case as "otherwise" un-

lawful or not. See also footnote 4, page 5, of Government's prior memorandum.

Since the Commission's order, upheld by the Third Circuit, prescribed the contract as the rate schedule to be observed, the companies' conduct is governed now by the Commission's order, not by the contract as a private agreement. Any contention as to the illegality of the arrangement so prescribed by the Commission, for antitrust reasons or otherwise, must be raised in the first instance before the Commission. No such contention has been presented to the Commission for determination with respect to its Safe Harbor orders.

In fairness to the other parties, we have deemed it advisable to set the record straight.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

BRADFORD ROSS,
General Counsel, Federal Power Commission.

MARCH, 1952.

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